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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 981

INDUSTRIAL UNION DEPARTMENT, AFL-CIO and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, *Petitioners*

vs.

THE BLACK HAWK CORPORATION

and

NATIONAL LABOR RELATIONS BOARD, *Respondents*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE BLACK HAWK CORPORATION IN OPPOSITION TO PETITION

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

The National Labor Relations Board Does Not Ask For Certiorari, And The Petitioners, As Limited Intervenors, Have Very Doubtful Standing To Do So

It is first and importantly to be noted that the National Labor Relations Board, which rendered the Decision and Order that were the subject of contro-

versy in the Court of Appeals, has not asked this Court to review this case.

Instead, the only Petitioners before this Court were intervenors—and belated intervenors—in the Court below. Moreover, the nature and scope of their intervention in the Court of Appeals was strictly limited.

The Industrial Union Department, AFL-CIO and Textile Workers Union of America, AFL-CIO, now Petitioners, took no part in the trial of this complaint case against The Black Hawk Corporation at the hearing before the Labor Board's Trial Examiner. After the Trial Examiner rendered his Decision, they filed exception only as to matters of remedy.

Upon the rendering of the Board's Decision and Order, the Company petitioned the United States Court of Appeals for review. The Board promptly appeared in opposition and asked for enforcement of its Decision and Order.

The Unions came in tardily and filed a "Motion For Leave To File Out Of Time A Motion For Leave To Intervene". The Court allowed the Unions to intervene, but only with respect to the subject of remedy, not for the purpose of making any contest on the merits of the case.[1]

Yet the Unions, by their Petition to this Court, now become the sole means through which this Court is asked to review the merits of the case.

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[1]The Unions' Motion and the Court's ruling thereon are hereinafter set forth as an Appendix to this Brief.

It Is Not The Practice Of This Court To Review Questions Of Fact Such As The Petitioners Now Seek To Present

As the Petition for Certiorari shows upon its face, this is a case in which this Court is being asked to review evidence and credibility of witnesses and the factual inferences to be drawn from the evidence and the testimony.

More specifically, The Black Hawk Corporation operates a cotton storage warehouse in Greenville, South Carolina, and the inquiry which the Petitioners desire this Court to undertake is whether there were, in the year 1967, such variances from the Company's normal operating procedures as to support an inference that the Company shaped the flow of cotton to and from that warehouse in that year for the purpose of curtailing its operations more than usual and at a different time than usual"—or whether such an inference is not sustained in view of the Company's business and operational explanations of the variances which occurred.

It is submitted that the authorities, and the rulings of this Court governing the granting of certiorari, all declare that this Court does not sit in review upon such questions.

"Whether on the record as a whole there is substantial evidence to support agency findings is a

question which Congress has placed in the keeping of the Courts of Appeals".

Universal Camera Corporation vs. National Labor Relations Board, 340 US 474, 491, 71 S Ct 456, 95 L Ed 456, 469

"Last term we made it plain that Congress charged the Courts of Appeals, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board. We stated that this Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way'. *National Labor Relations Board v. Pittsburgh S.S. Co.* 340 US 498, 503, 95 L ed 479, 482, 71 S Ct 453 (1951). We repeat and reaffirm this rule, noting its special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case".

National Labor Relations Board vs. American National Insurance Company, 343 US 395, 409-410, 72 S Ct 824, 96 L Ed 1027, 1040

National Labor Relations Board vs. Pittsburgh Steamship Company, like the case the Petitioners now seek to present, was a case in which the Court of Appeals had "concluded that the inferences on which

the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by 'substantial' evidence". There this Court said:

"Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . .' Taft-Hartley Act § 10(e), 61 Stat 148, ch 120, 29 USC (Supp III) § 160(e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal'. *Layne & Bowler Corp. v. Western Well Works*, 261 US 387, 393, 67 L ed 712, 714, 43 S Ct 422; Revised Rules of the Supreme Court of the United States, Rule 38(5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assess-

ment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated.

"In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations'. *Federal Trade Com. v. American Tobacco Co.*, 274 US 543, 544, 71 L ed 1193, 1194, 47 S Ct 663."

National Labor Relations Board vs. Pittsburgh Steamship Company, 340 US 498, 502-503, 71 S Ct 453, 95 L Ed 479, 482-483

"We do not grant a certiorari to review evidence and discuss specific facts".

United States of America vs. Johnston, 268 US 220, 227, 45 S Ct 496, 69 L Ed 925, 926

"There is nothing in the lower courts' decision on either of the added questions to warrant review here . . . Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it". *General Talking Pictures Corporation vs. Western Electric Company*, 304 US 175, 178, 58 S Ct 849, 82 L Ed 1273, 1275

See also Rule 19 1(b) of the Rules of this Court, outlining the "Considerations Governing Review on Certiorari".

The petitioning Unions seem to consider that this Court should review this case because various other litigations which J. P. Stevens & Co., Inc. has had under the National Labor Relations Act have been decided adversely to the Company. It is submitted, however, that the history of those cases argues against the granting of the present Petition for Certiorari, not for it.

For example, in what the Petitioners refer to as Stevens I, *J. P. Stevens & Co., Inc., vs. National Labor Relations Board*, 360 F 2d 292 (2nd Cir., 1967), the Labor Board heard four hundred and forty-three witnesses testify on a multitude of disputed and material factual issues. Most of these witnesses testified for the Company. They included not only supervisors and representatives of management, but rank and file employees and persons unconnected with the Company as well. Yet upon every disputed and material issue of fact, the Board never once found any witness

for the Company to be telling the truth nor any witness for the Union or the Board to be telling anything but the truth! The Company believing that to be a case of obviously one-sided "fact finding" on a major scale, sought review in this Court. Yet this Court declined to grant certiorari.

The Argument Presented In The Petition Is Not Supported By The Record

The present case related entirely to the termination of the employment of seventeen individuals during the course of a curtailment of operations by The Black Hawk Corporation in September, October and November of 1967.

As has been noted above, the Company operates a warehouse for the storage of cotton. It was undisputed that this business is seasonal and that in each and every year of its operations, the Company has reduced the number of its warehouse employees during its slack season (27-28, 115[1]).

It was further undisputed that in each and every year, such reductions in work force have been accomplished by terminations, not temporary lay-offs, and in strict accordance with seniority (49, 115-116). Still further, it was undisputed that such was exactly the

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[1]Unless otherwise indicated, all page references are to the printed Appendix filed with the United States Court of Appeals for the Fourth Circuit.

procedure followed with respect to the individuals involved in the present case (22, 49, 116, 118[1]).

In two respects only did the Board find fault with the work force reduction in 1967, namely, that it was larger than usual and that it came later in the year than usual. The Board's whole claim was that because of these two elements, it was clear that the individuals in question were terminated "in order to affect" the outcome of an election at the Company's warehouse (4).

In all the years of the Company's operations, the annual reductions in the number of warehouse employees, from high point to low point, were as follows (155):

In 1961, from 38 to 22 — that is, 16.

In 1962, from 44 to 29 — that is, 15.

In 1963, from 45 to 24 — that is, 21.

In 1964, from 47 to 27 — that is, 20.

In 1965, from 69 to 40 — that is, 29.

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[1]There were three women as to whom this did not apply. With regard to them, the uncontradicted evidence was that they were temporary samplers of "loose" cotton; that they were "the only women working in the warehouse"; that this was the first and only year that women were thus employed "in the warehouse"; and that "they were hired with the understanding" that their work "was temporary" and that "they would be cut off" as soon as the loose sampling work, which they were doing, was completed (117-118).

In 1966, from 71 to 45 — that is, 26.

In 1967, from 61 to 31 — that is, 30[1].

It is thus immediately to be seen that the work force reduction in 1967, was not of such magnitude, by comparison to other years, as to constitute proof of anything against the Company[2].

It is further to be noted not only that in making the terminations here at issue the Company strictly followed seniority, but that there is no evidence that the Company had any knowledge or inkling as to which individuals among its employees were "for" the Union and which of them were "against" it (Tr. 158).

The Board's Trial Examiner pointed out that in its mechanical shop adjacent to the warehouse, the Company did not reduce the work force but instead increased it by three during September and October of 1967. As to this, however, there was no evidence whatever that the work of the shop was of a seasonable nature, or that it was in any way confined to the

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[1]After the election this figure of 31 dropped to 28. Since, however, the claim against the Company is that the terminations in question were made "in order to affect the results of the election", the pertinent figure would seem to be the number to which the employees had been reduced at the time of the election, namely, 31. Indeed, the fact that terminations occurred after the election would seem to be in itself a circumstance indicating that terminations were not being made for the purpose of influencing the election.

[2]It is further to be noted that the 17 terminations which the Board complained of were by no means all of the terminations occurring in 1967.

repair or maintenance of the machines in the warehouse, or that reduction in the work force of the shop should have followed, or ever did follow, reduction in the work force of the warehouse.

As to the claim that the Company wrongfully caused its work force reduction in 1967 to occur at a time which would "affect the results of the election" (4) held on October 25, of that year, the pertinent evidence was as follows.

A "cotton season" is defined in the trade as running from August 1 to August 1, since the "first cotton" from any new crop becomes "available" in the month of August (133).

During the latter part of the year 1966, the cotton-buying officials of J. P. Stevens & Co., Inc., anticipated —and as it turned out correctly anticipated—that the price of cotton was going to be much higher in the following season, that is, the 1967-1968 season (78). The Company therefore in November and December of 1966 and January of 1967, bought an "unusual" amount of cotton, "approximately 650,000 bales", more than it had ever purchased before in any season and more than twice the amount it purchased in the following season (78-79, 134-138).

Approximately half of Stevens purchases of cotton each year move to the Black Hawk warehouse and from there to the Stevens manufacturing plants (125). Approximately half remains in warehouses, principally along the Mississippi River where it was

purchased, and is shipped from such warehouses direct to the Stevens plants (128-129, 130-132).

The results of the extraordinarily heavy buying[1] of cotton by Stevens in November and December of 1966 and January of 1967, were, first, that the Black Hawk warehouse, which normally has its slack season from about May through August, was kept busy throughout this period in 1967, and well into August of that year (140-141). Therefore, the labor reductions here in question did not take place as usual during that period of time.

A further result of the heavy purchases described above was that when activity at the Black Hawk warehouse began to slacken after August in 1967, it was not picked up as usual by incoming movement of the new cotton crop, for the simple reason that Stevens, having its heavy purchases in hand, was buying very little of the new crop—which was turning out to be not only the shortest crop since the year 1895, and of "extremely high" price, but was of "very poor quality" and very "late" (77-79, 141-143).

A still further consequence that Stevens' large and fortunate purchases of cotton in November and December of 1966 and January of 1967, was explained as follows. A principal purpose of a large cotton warehouse is not only the storing and protecting of the cotton, but also the gathering of the hundreds and thousands of bales of many different types and grades

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[1]The Board conceded that it was such (5).

and staples, from many different sources, so that a number of bales of the same type or grade or staple can be sorted out and put together and thereby make possible a uniform shipment of substantial size to a plant using that type or grade or staple (125-132, 144-145, 148-149, Tr. 505, Tr. 509-510).

In 1967, as a result of its very large purchases, Stevens had on hand an unusual amount of cotton from which to sort out uniform aggregations of bales in the principal areas of purchase, that is, in the warehouses of the Mississippi River region (128-132). This was, therefore, done there, in those so-called western warehouses, in larger measure than ever before. And when the Black Hawk warehouse had largely finished all other gathering and sorting and shipping in the late Summer of 1967, these western warehouses began to ship directly to the plants more than they ever had before[1] (137-144, 148-149, Tr. 505).

This avoided the expense and trouble of such cotton being shipped to the Black Hawk warehouse and unloaded and stored there and then being loaded and shipped again, in order to reach the manufacturing plants[2]. But such direct shipments from the western warehouses to the manufacturing plants obviously did not contribute toward increasing activity at the Black Hawk warehouse.

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[1]The grading and classifying for such direct shipments having already been done during the earlier months of 1967.

[2]In addition to storage charge, the Black Hawk warehouse charged $1.40 per bale for loading and unloading.

To all of this explanation, the Board made only one reply—that if Stevens had followed past practice, it would have shipped more cotton from the western warehouses to Black Hawk in the Fall of 1967, than it did, and that would have helped to keep Black Hawk busy (7). But nowhere did the Board or its Examiner face up to the Company's clear answer to this, as explained above, namely, that because of its exceptional wide and heavy purchases in November and December of 1966 and January of 1967, the Company was able to accomplish more direct shipping to manufacturing plants from western warehouses than ever before—by reason of larger quantities in those warehouses from which to sort out uniform blocks for direct shipment.

In other words, Stevens was able in greater degree than ever before to accomplish in the western warehouses what it would otherwise have to ship from them to Black Hawk in order to accomplish, namely, the bringing together of large quantities of bales of cotton so that sorting into uniform blocks or aggregation could be done. And thereby, at the very least, Stevens saved $140.00 per freight carload[1], which on hundreds and hundreds of carloads is hardly to be disregarded (128-131).

The Board and its Examiner declared that such direct shipments resulted in "considerable cost" to

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[1]As pointed out above, Black Hawk's charge for unloading, handling and reloading was $1.40 per bale, and there are approximately 100 bales to a carload (126).

Stevens (6). In explanation of this, the Examiner pointed out that on "some" of such direct shipments there would be a railway transit charge of about $14.00 per carload, and was the cost of sending "two pound samples" to Greenville, S. C. for "classification" (42).

It is submitted that this was indeed "straining at a gnat and swallowing a camel". How is it that the Board and the Examiner had acuté vision for such minutiae as this, but could not see the circuitous and broken route of shipment and re-shipment via Black Hawk and the $140.00 charge per car for unloading, handling and reloading at Black Hawk.

But, said the Examiner, "since Black Hawk is a wholly owned subsidiary of Stevens"—this is money, "in effect paid to itself" (41). This is amazing reasoning. Is it not obvious that Stevens, or more precisely, its subsidiary, Black Hawk, has to pay employees to unload and handle and reload these carloads of cotton, and that by short-circuiting such unloading and handling and reloading process, through direct shipments to plants, Stevens can save such costs? Apparently the Board would have had the Company retain these employees solely for the sake of paying wages to them.

There was another very significant aspect to the Board's criticism of Stevens' increased shipments to plants direct rather than through Black Hawk. Upon all the evidence before him, the Board's Examiner found himself able to complain of such shipments

from only two western warehouses, namely, the warehouse at Gulfport, Mississippi, and the warehouse at Clarksdale, Mississippi (36).

With regard to the first of these, the Examiner devoted elaborate discussion, not actually to increased shipments from this warehouse direct to manufacturing plants in the Fall of 1967, but rather to increase in the quantity of cotton placed in this warehouse in the Fall of 1967 (36-40). The Board definitely stated, however, that "it was not the placing of the cotton in" such warehouse that it "find[s] significant" (6). The Board said that it placed significance only in the increase of shipping from such warehouse "directly" to manufacturing plants instead of "through Black Hawk"—Black Hawk thus receiving less business from such warehouse than it had before.

A tabulation introduced into evidence by the Board's General Counsel showed that during the months of September, October, November and December of 1966, there were 21 carloads of cotton shipped from this warehouse direct to Stevens' manufacturing plants, and that during the same months of 1967, there were 60 such cars of such direct shipments from this warehouse. The difference of 39 cars would have provided total unloading, handling and reloading employment for seventeen employees at the Black Hawk warehouse amounting to less than five days.

As to the Clarksdale warehouse, the same comparison showed a difference of 29 carloads—again a quantity of cotton which, had it been shipped to Black

Hawk instead of going direct to manufacturing plants, would have furnished employment for seventeen warehouse laborers, of substantially less than four days.

Thus the Board showed approximately eight days employment which it said the individuals in question could have had except for Stevens' shipping more cotton than usual from western warehouses, direct to manufacturing plants in the Fall of 1967.

The Board's Examiner also strained zealously to find that in the Fall of 1967, "Stevens commenced consigning the great bulk of its shipments from outlying areas to the commodity warehouse in Greenville, a public warehouse having no connection with Black Hawk or Stevens" (33). But the Board declined to follow its Examiner on this expedition, saying that it did not see any reason to declare that the Company made any "unusual use of commodity in 1967" (5). Yet the Unions, in their Petition to this Court (p.7) now rely upon a contention with respect to shipments to the public commodity warehouse in Greenville, which neither the Court of Appeals nor the Board itself would accept[1].

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[1]At the conclusion of the testimony of the Company's witnesses, the Company not only presented tabulations as requested by the Trial Examiner, relative to Stevens' inventories, acquisitions, and consumption of cotton for three years by months, but also offered to present "the original records" on "any of the figures" referred to in the Company's testimony (153).

The sum and substance of the whole matter is that each and every year, at the Black Hawk warehouse, a reduction of the work force takes place. That it occurred as it did and when it did in 1967, resulted naturally and reasonably from decisions made and actions taken in the latter part of 1966 and early 1967—all at a time long before anyone claimed there was any Union campaign in existence[1].

From those decisions and actions, relative to the largest purchases of cotton in the Company's history, it logically followed:—that the Black Hawk warehouse would be busy, into and through the Summer of 1967, longer than usual, and that its slack period would therefore be later than usual—that when such late slack period did begin in September of 1967, it was not relieved by the usual purchases and movements of new crop cotton, because Stevens having on hand an abnormal supply of cotton was purchasing very little of the new crop—that Black Hawk's late slack period in the Fall of 1967, was moreover unrelieved because Stevens, having unusually large quantities of cotton in western warehouses from which to sort, was able to make more direct shipments than usual from these warehouses to the manufacturing plants.

The idea, for which the Unions are contending, that the decisions and actions governing these mat-

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[1]The Trial Examiner found that the Union "began" its "organizing campaign among the employees at the Black Hawk warehouse in the latter part of June, 1967" (20-21).

ters, involving many millions of dollars and determined many months before the Union's campaign was ever heard of, were in fact and truth, shaped so as to affect the outcome of the October 25 election at the Black Hawk warehouse—is nothing short of preposterous.

The "proof" against the Company deserved no such label at all. It was the merest aggregation of wisps and straws, convincing of nothing. And the Board's "finding" against the Company was nothing other than speculation, surmise and conjecture.

The Court of Appeals rightly determined that the ruling of the Board was not supported "on the record considered as a whole".

CONCLUSION

Upon all of the foregoing, The Black Hawk Corporation earnestly contends that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for The Black Hawk Corporation

United States Court of Appeals
FOR THE FOURTH CIRCUIT

THE BLACK HAWK CORPORATION,
Petitioner,

v.

NATIONAL LABOR
RELATIONS BOARD,
Respondent.

No. 13,746

MOTION FOR LEAVE TO FILE OUT OF TIME A MOTION FOR LEAVE TO INTERVENE

To the Honorable, the Judges of the United States Court of Appeals for the Fourth Circuit:

The Industrial Union Department, AFL-CIO, and the Textile Workers Union of America, AFL-CIO, together move this Court for permission to file out of time a motion for leave to intervene in the above case.

In support of their joint motion, the Movants show that the Petitioner filed its petition for review in this Court on July 24, 1969. Due to certain staff changeovers, in particular the resignation of the attorney who represented both the Industrial Union Department and the Textile Workers Union of America in the Board proceedings below, the Movants did not file a motion for leave to intervene within the period prescribed by Rule 15(d) of the Federal Rules of Appellate Procedure.

WHEREFORE, the Industrial Union Department, AFL-CIO, and the Textile Workers Union of America,

AFL-CIO, pray that their motion be granted and that it be allowed to file and serve out of time, a motion for leave to intervene.

PATRICIA E. EAMES
Attorney for Industrial Union Department, AFL-CIO, and
Textile Workers Union of America, AFL-CIO,
99 University Place
New York, N. Y. 10003

Dated: New York, N. Y.
this 8th day of September, 1969.

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 13,746

THE BLACK HAWK CORPORATION,
Petitioner,

vs.

NATIONAL LABOR
RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board

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Upon consideration of the motion for leave to file out of time a motion to intervene, the motion to intervene and response to the motions,

Leave is granted the Industrial Union Department, AFL-CIO and the Textile Workers Union of America, AFL-CIO, to intervene, such intervention to be limited to the exceptions taken in the proceedings before the National Labor Relations Board, pursuant to Rule

15(d) of the Federal Rules of Appellate Procedure and Local Rule 5(a).

FILED
SEP 18 1969
SAMUEL W. PHILLIPS
Clerk

For the Court—by direction.

s/ Samuel W. Phillips

Clerk

A True Copy, Teste:
Samuel W. Phillips, Clerk
By Margaret W. Walton

Deputy Clerk